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In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 474

LESLIE D. BLOOM, *et al.*,
Petitioners,

v.

JOHN W. WILLIS, *et al.*,
Respondents.

PETITION FOR A REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

W. T. SAYE,
604 Southwest Reserve Life
Insurance Building,
P. O. Box 401,
Longview, Texas,
Attorney for Petitioners.

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No. 474

LESLIE D. BLOOM, *et al.*,

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Respondents.

PETITION FOR A REHEARING ON ORDER OF MARCH 16, 1953 DENYING WRIT OF CERTIORARI

Petitioners respectfully pray for a rehearing and reversal of the order hereinbefore entered on the 16th day of March, 1953, denying their petition for a writ of certiorari to the Supreme Court of the State of Louisiana, on the following grounds:

1. In keeping with its usual practice, this Court has indicated no reason for denying the petition. If the decision is based on the view that it is necessary that the record affirmatively show; first, that the Supreme Court of Lou-

isiana considered and passed on the Federal Question raised in the petition for a rehearing in that court, and, second, that even if the state court did decide the Federal Question, its decision might be upheld by reason of an adequate non-federal question to support it, petitioners respectfully submit that they should be granted the privilege of applying to the state court for a certificate stating the grounds of its decision, and they, therefore, pray that the order denying the writ be revoked and that they be given a reasonable time in which to make and present an application for such a certificate.

2. If the petition was denied as a matter of judicial discretion, unsupported by logic or established principles of justice, the decision was beyond the powers of this Court, is a nullity, and should be vacated and the petition decided in accordance with law, justice and good conscience.

Respectfully submitted,

.....

Attorney for Petitioners.

I hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified.

Dated March 28, 1953.

.....

Attorney for Petitioners.

STATEMENT AND SUPPORTING BRIEF

I.

REASON NO. 1

Reason or Ground No. 1 is amply supported by the following authorities:

Hammerstein v. Superior Court of California, 340 U. S. 622, 95 L. Ed. 586;

Herb v. Pitcairn, 324 U. S. 117, 89 L. Ed. 789;

Minnesota v. National Tea Co., 309 U. S. 551, 84 L. Ed. 920;

Young v. Ragan, 337 U. S. 235, 93 L. Ed. 1333;

Darr v. Burford, 339 U. S. 200, 94 L. Ed. 761;

Ex Parte Henry Hauk, 321 U. S. 114, 88 L. Ed. 572.

In *Minnesota v. Superior Court of California*, supra, this Court, speaking through Mr. Justice Douglas, made the following observations:

> "Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350, consistently with the policy

of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case.

"But that does not mean that we should dismiss the petition. This Court has frequently held that in the exercise of its appellate jurisdiction it has power not only to correct errors of law in the judgment under review but also to make such disposition of the case as justice requires. State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605; Patterson v. Alabama, 294 U. S. 600; 79 L. Ed. 1082, 55 S. Ct. 575.

"It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the Federal Constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions."

> "For these reasons we vacate the judgment of the Court of Minnesota and remand the cause to that court for further proceedings." *Minnesota v. National Tea Co., 309 U. S. 551, 559; 84 L. Ed. 920.*

Many other cases of like import might be cited, but these should be sufficient. Some of these cases involve petitions for writ of habeas corpus and involve the rights of persons claiming to be unlawfully confined in prison while others pertain to petitions for writs of certiorari involving individual property rights. This court's decisions show, without exception that where the legal principle involved is the same, it is of no importance whether the case is civil or criminal, or is presented by certiorari or habeas corpus.

II.

REASON NO. 2

The question raised by this proposition is of utmost importance. It challenges the validity of procedural practice that by operation and effect may be used as an instrumentality for nullifying a substantial Constitutional Right.

Judicial discretion is defined in *Ballentine's Law Dictionary, Second Edition (1948)*, as follows:

> "In its technical legal sense, judicial discretion is the name of the decision of certain questions of fact by the court. 'A close attention to the difference between fact and law, and the difference between an exercise of judicial discretion (unfortunately so-called) and a

decision of law, will remove much of the obscurity in which the subject of relevancy of evidence has been involved.' See Darling v. Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

"Judicial discretion is not an arbitrary power, but a judicial one, governed and directed by known and established rules. It is nothing more nor less than a discretion to do in any particular case what the ends of justice demand. See Sioux Falls v. Marshall ... S. D. ..., 45 A. L. R. 447, 451, 204 N. W. Rep. 999."

ABUSE OF DISCRETION: Dr. Ballentine defines as follows:

"The expression does not mean only the decision of a case by whim or caprice, arbitrarily, or from a bad motive, but it also means that the discretion has not been justly and properly exercised under the circumstances of the case. It has also been held to mean such an abuse as amounts practically to a denial of justice. In this view it signifies a clearly erroneous conclusion and judgment; one that is clearly against the logic and effect of the facts presented. See 56 Am. Jur. 75."

In *Black's Law Dictionary, Second Edition, Judicial Discretion* is defined as follows:

"A liberty or privilege allowed to a judge, within the confines of rights and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable, and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles and analogies of the law. Osborn v. United States Bank, 9 Wheat. 866, 6 L. Ed. 204; Ex parte Chase, 43 Ala. 310; Lent v. Tillson, 140 U. S. 316, 11 Sup.

Ct. 824, 35 L. Ed. 419; State v. Cummings, 36 Mo. 278; Murray v. Buell, 74 Wis. 14, 41 N. W. 1010; Perry v. Salt Lake City Council, 7 Utah 143, 25 Pac. 998, 11 L. R. A. 446.

"When applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment and conscience of others. This discretion undoubtedly is to some extent regulated by usage, or, if the term is preferred, by fixed principles. But by this is to be understood nothing more than that the same court cannot, consistently with its own dignity, and with its character and duty of administering impartial justice, decide in different ways two cases in every respect exactly alike. The question of fact whether the two cases are alike in every color, circumstance, and feature is of necessity to be submitted to the judgment of some tribunal. Judges v. People, 18 Wend. (N. Y.), 79, 99.

"Lord Coke defines judicial discretion to be '*discernere per legem quid sit justum*,' to see what would be just according to the laws in the premises. It does not mean a wild self-willfulness, which may prompt to any and every act; but this judicial discretion is guided by the law (see what the law declares upon a certain statement of facts, and then decide in accordance with the law), so as to do substantial equity and justice. Faber v. Bruner, 13 Mo. 543.

"True, it is a matter of discretion; but then the discretion is not willful or arbitrary, but legal. And, although its exercise be not purely a matter of law, yet it 'involves a matter of law and legal inference,' in the language of the Code, and an appeal will lie. Loviner v. Pearce, 70 N. C. 171.

"In criminal law and the law of torts, it means the capacity to distinguish between what is right and wrong, lawful or unlawful, wise or foolish, sufficient-

ly to render one amenable and responsible for his acts. Towle v. State, 3 Fla. 214.

"*Judicial Discretion, Legal Discretion:* These terms are applied to the discretionary action of a judge or court, and mean discretion as above defined, that is, discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained."

If the Court's decision was based on an arbitrary application of judicial discretion, or, in other words, the petition denied without reasonable grounds and without any regard to the fair, equitable, and wholesome administration of justice, it is, of course, beyond the authority and power of this Court. Under our system of government, no department of government or tribunal lawfully possesses such power. If it exists at all, it rests in the people and they alone can delegate it.

The Constitution must be considered and interpreted as a whole, and with reference to the common law. The common law has never sanctioned or tolerated the abuse of judicial discretion. Nevertheless, if a litigant is denied relief or a right by this court, whatever the reason may be, he is necessarily bound to accept it, because there is no appeal from its decisions. They are final, whether right or wrong, and it is futile to argue otherwise.

The following cases, it seems, conclusively show that petitioners have been denied the right of a fair trial by decision without reasonable grounds to support it.

In *White v. Ragan* and *Lutz v. Ragan, 324 U. S. 760; 89 L. Ed. 1348*, which was consolidated with the case of *White v. Ragan*, supra, in this Court, it is stated in the opinion

of the Court as follows: "It was alleged that the prosecuting attorney induced and procured this testimony by bribery of the witnesses; and that he introduced it at the trial, with knowledge that it was false. Attached to the petition are the affidavits of the two witnesses in question, each stating that his testimony at the trial was false and that he was bribed to give it by the prosecuting attorney. The affidavits of two other persons, also attached to the petition, tend to corroborate the affidavits of the two witnesses.

Since the Supreme Court of Illinois dismissed both petitions without requiring respondent to answer, we must assume that the petitioners' allegations are true. Williams v. Kaiser, 323 U. S. 471, 473, 474, ante 362, 65 S. Ct. 363; House v. Mayo, No. 921, decided February 5, 1945 (342 U. S., 42, ante, 739, 65 S. Ct. 517.)

In *Williams v. Kaiser, 323 U. S. 471, 473; 89 L. Ed. 398, 401*, opinion by Mr. Justice Douglas, it is stated: "The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. *Hence we must assume that the allegations of the petition are true.*"

In a percuriam opinion in *House v. Mayo, 324 U. S. 42, 45; 89 L. Ed. 739, 742*, it is stated: "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, *we must assume that the petitioner's allegations are true.*"

To the same effect see *Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859*, opinion by Mr. Justice Black.

In *Bridges v. California, 314 U. S. 252, p. 260, 86 L. Ed. 192, p. 201*, we quote the following from the opinion of Mr. Justice Black: "If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

In *Dennis v. U. S., 339 U. S. 162, p. 173, 94 L. Ed. 734, p. 743*, Mr. Justice Jackson in a concurring opinion stated the proposition as follows: "I adhere with increasing conviction to my dissent in *Frazier v. United States, supra (335 U. S. at 514, 93 L. Ed. 200, 69 S. Ct. 201)*. The Court there dug a pit dangerous for civil liberties. The right to fair trial is the right that stands guardian over all other rights." In the same case *339 U. S., page 184; 94 L. Ed., page 749*, in a dissenting opinion Mr. Justice Frankfurter said: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."

CONCLUSION

Most, if not all the authorities herein cited, are in further support, clarify and amplify issues presented in petitioners' former briefs, and the same is true concerning comment and argument of counsel. This is unavoidable. The points are so closely related to one another that they are governed by the same legal principles, and often supported by the same cases.

Counsel has not intentionally transgressed the rules of this Court, but the restrictions and limitations in Rule 33 pertaining to Petition for a Rehearing of decisions on certiorari, it is extremely difficult to discuss the case and literally comply with the rule.

The petition for writ of certiorari was based squarely on the proposition that Petitioners had been denied the opportunity of a hearing or a fair trial, as the term is used in the Due Process Clause. Their claim was predicated on the further proposition that the undisputed record evidenced their contention because the facts alleged were not denied, and that as respondents failed to answer the facts must be presumed to be true.

A number of the cases above cited are exactly in point and unequivocably hold that petitioner was exactly correct in its interpretation. Some of them have nothing more than the uncorroborated sworn statement of a convict to support them.

It follows that if those cases are right, the petition should have been granted, and it would seem that the discretionary powers of this Court were obviously arbitrarily applied.

Respectfully submitted,

W. T. SAYE,
604 Southwest Reserve Life
Insurance Building,
P. O. Box 401,
Longview, Texas,

Attorney for Petitioners.

The names and addresses of counsel for respondents are as follows: Oliver and Digby, Ouachita Bank Building, Monroe, Louisiana; Warren L. Hunt, Rayville, Louisiana; Sholars, Gunby & Guthrie, Bernhardt Building, Monroe, Louisiana; Cotton and Bolton, Rayville, Louisiana; Tucker, Bronson & Martin, Shreveport, Louisiana; McBride & Goff, Ruston, Louisiana; Albritton, Ware, Litton & West, Baton Rouge, Louisiana; Thompson, Thompson & Sparks, Monroe Louisiana.

I, W. T. Saye, of counsel for petitioners in the foregoing brief, hereby certify that a copy hereof has been served on each of the above named counsel for respondents.

This 28th day of March, 1953.